



The inherent dangers and legal complexities which arise when a solicitor acts for both parties in a voluntary transfer were spelt out with great clarity by the Supreme Court in its decision in *Carroll –v- Carroll*, Supreme Court, 21st July, 1999. Those complexities create dangers not just for the parties but for the practitioner who acts for both parties. The Law Society has not decided to prohibit acting for both sides but great care must be taken. There are certain cases where a solicitor may not act for both donor and donee and it is incumbent on the practitioner to appraise him/herself of all the circumstances and then make the decision as to whether he/she can properly and professionally continue to act for both parties.

The Conveyancing Committee has prepared this practice note to assist those solicitors who may wish to act for donor and donee in a voluntary transfer and to assist them in reaching the decision as to whether they can properly do so.

The presumption of undue influence is the first hurdle that must be overcome. The Supreme Court in its decision held that where the presumption of undue influence exists the onus lies on the donee to establish that the gift resulted from the "free exercise of the donor's will": as the presumption is a rebuttable one and is a rule of evidence the donee must adduce the evidence necessary to rebut it. While the courts have declined to limit the categories of relationship in which the presumption will arise, the more obvious ones are solicitor and client, doctor and patient, religious adviser and pupil, trustee and beneficiary as well as intra-family relationships.

It goes without saying that undue influence may actually exist in an individual case: care must be taken to ensure that this does not arise.

To assist in reaching the necessary conclusions on aspects such as undue influence the following should be borne in mind:-

1. Clients should be seen separately.
2. Should either the donor or donee be independently advised? A solicitor who has previously acted for a member of a family and who is asked to act for the first time for a prospective donor would do well to have the donor separately advised. Equally a solicitor who has previously acted for the donor should consider advising the donee, in a situation where the transfer will impose obligations on the donee, to be independently advised.
3. Full instructions must be taken of all relevant family circumstances and family relationships.

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4. Full details of the donor's other assets must be obtained to decide whether the donor is in a financial position to carry into effect his/her desire.
5. A decision on the donor's mental capacity must be taken. Should medical opinion be sought?
6. Is the proposal a free exercise of the donor's will?
7. Does the donor's physical situation allow the gift to be made? What are his/her future requirements? What will his/her future accommodation be? Does the proposal put in jeopardy his/her financial independence? Does he/she appreciate the situation?
8. Does the proposal imperil the financial independence of other members of the family? Have other members of the family been made promises or relied on arrangements which will be affected by what is proposed? Do the proposals contradict any previously drawn wills or other documents?
9. Is the solicitor aware from dealings with other members of the family that this proposal will surprise other family members?
10. Even if independent advice is not required care must be taken in explaining the consequences of the proposed action to both donor and donee. Professional skill and judgement is required in advising both parties. This is not fulfilled by simply following instructions without considering the appropriateness of what is being undertaken.
11. A solicitor acting for both cannot be independent of the donee.
12. Careful notes of all attendances on the parties must be kept. Full written advice to the parties must be given on all aspects of the transaction. Any documents requiring execution must be given to the parties in advance for perusal and must be read and explained to them.